

This certification arises in an appeal from an order of the United States Bankruptcy Court for the Eastern District of Virginia entered on December 15, 2022.

The order involves a question of law as to which there is no controlling decision of the court of appeals for this circuit or of the Supreme Court of the United States, or involves a matter of public importance.

[The parties may include or attach the information specified in Rule 8006.]

This appeal arises out of the chapter 11 bankruptcy cases filed in November 2008 by Circuit City Stores, Inc. and certain of its subsidiaries and affiliates (collectively, “Circuit City”). Under sections 589a and 1930(a)(6) of title 28, for every quarter that a chapter 11 case is open, statutory fees must be deposited into the United States Trustee System Fund within the United States Treasury. 28 U.S.C. §§ 1930(a)(6), 589a. These quarterly fees are calculated on a sliding scale based on the amount of disbursements during the calendar quarter. 28 U.S.C. § 1930(a)(6). In 2017, Congress amended the statute to temporarily increase the quarterly fee payable in the largest chapter 11 cases for quarters beginning on or after January 1, 2018. This amendment was codified in 28 U.S.C. § 1930(a)(6)(B).

As part of the plan of reorganization, the bankruptcy court approved the formation of the Circuit City Stores, Inc. Liquidating Trust (the “Trust”) and required that the Liquidating Trustee remit quarterly fees to the Office of the United States Trustee. On March 28, 2019, the Liquidating Trustee filed a motion asking the bankruptcy court to hold that (1) the 2017 amendment does not apply to this case because such application would be unconstitutionally retroactive, and (2) the 2017 amendment is unconstitutional as applied to this case because it violates the uniformity provision of the Bankruptcy Clause of the Constitution, U.S. Const. Art. I, § 8, cl. 4, because bankruptcy administrator districts (six districts in Alabama and North

Carolina that do not participate in the United States Trustee Program and instead are administered by judicial branch employees) collected the increased fees only for cases filed on or after October 1, 2018.

The bankruptcy court ruled that the 2017 amendment applied to this case but was unconstitutionally non-uniform and converted Plaintiff's motion to an adversary proceeding, docketed under adversary case number 19-03060. *In re Circuit City Stores, Inc.*, 606 B.R. 260 (Bankr. E.D. Va. 2019). Both parties appealed. Under 28 U.S.C. § 158(d), a direct appeal to the Fourth Circuit was certified.

After the Fourth Circuit upheld the 2017 amendment, on June 6, 2022, the Supreme Court held that the 2017 amendment "violated the uniformity requirement" of the Bankruptcy Clause. *Siegel v. Fitzgerald*, 142 S. Ct. 1770, 1782-83 (2022). But it remanded to the Fourth Circuit to determine the appropriate remedy for that lack of uniformity. The Fourth Circuit then remanded that question to the bankruptcy court.

While the appeal of the bankruptcy court's 2019 decision was pending, the Liquidating Trustee filed a separate adversary complaint against John P. Fitzgerald, III, Acting United States Trustee for Region Four, the United States Trustee Program, and Ramona D. Elliott, Acting Director² (collectively "Defendants"), Adv. No. 19-03091, seeking declaratory relief and the return of the amount representing the difference between the quarterly fees paid by the Trust and the amount that the Trust would have paid in a bankruptcy administrator district. The

² Ramona D. Elliott, Acting Director, is substituted for defendant Clifford J. White, III, Director, pursuant to Federal Rule of Bankruptcy Procedure 7025, which incorporates Federal Rule of Civil Procedure 25(d), which provides for automatic substitution when a governmental official ceases to hold office. After the Complaint was filed, Mr. White retired and Ms. Elliott became Acting Director.

bankruptcy court consolidated the two adversary proceedings under adversary case number 19-03091.

On December 15, 2022, the bankruptcy court issued a Memorandum Opinion and an Order in the consolidated proceeding ruling that the Trustee can recover “the amount of the portion of the quarterly U.S. Trustee fees paid that exceeded the amount the [Trustee] would have had to pay in a bankruptcy administrator district, inclusive of the first three quarters of calendar year 2018.” Defendants filed a notice of appeal on December 26, 2022.

Neither the Fourth Circuit nor the Supreme Court has addressed what the appropriate remedy is for the unconstitutional lack of uniformity found by the Supreme Court in *Siegel*. The Supreme Court in *Siegel* expressly declined to address that question, remanding it the Fourth Circuit. The Fourth Circuit likewise declined to address that question and remanded it to the bankruptcy court. The question presents a “matter of public importance” because it could significantly impact the public.

Accordingly, the Defendants and the Liquidating Trustee (all appellants and appellees) jointly certify that the bankruptcy court’s order “involves a question of law as to which there is no controlling decision of the court of appeals for the circuit or of the Supreme Court of the United States” and it “involves a matter of public importance.” 28 U.S.C. § 158(d)(2).

Respectfully submitted,

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